LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 26 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 21303 (9th Cir.) No. 984

MONTE VISTA LODGE,
Petitioner,

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

STERLING HUTCHESON
14th Floor, Bank of America Building
San Diego, California 92101
Attorney for Respondent.

GRAY, CARY, AMES & FRYE
ROBERT AMES
DAVID E. MONAHAN
14th Floor, Bank of America Building
San Diego, California 92101

ADAMS, DUQUE & HAZELTINE
BRUCE A. BECKMAN
523 West Sixth Street
Los Angeles, California 90014
of Counsel

ARTS & CRAFTS PRESS, SAN DIEGO, CALIFORNIA

SUBJECT INDEX

Page

I. CITATION TO OPINION BELOW 2

II. QUESTION PRESENTED 2

III. STATUTORY PROVISION INVOLVED 2

IV. STATEMENT OF THE CASE 3

V. ARGUMENT 4

A. No "Special and Important Reasons" Exist for Granting a Review on Certiorari 4

B. Whether Alternative Remedies Are Open to Petitioner Was Not Before the Courts Below 7

C. Section 263 is Unambiguous 7

D. The Legislative History of Section 263 Coincides with its Plain Meaning 8

E. The District Court's Inherent Equity Powers Do Not Extend its Jurisdiction to Areas Expressly Proscribed By the Bankruptcy Act 11

VI. CONCLUSION 12

TABLE OF CITATIONS

Case

Page

Monte Vista Lodge v. *The Guardian Life Insurance Company of America*, 384 F. 2d 126 (9th Cir. 1967) 2

Statutes

Bankruptcy Act, Section 2(a)15 12

Bankruptcy Act, Section 77 B(n) 8, 9, 10

Bankruptcy Act, Section 263 ..... 2 thru 13

National Housing Act, Section 231 ..... 3, 6

Public Law 89-754, Section 501 ..... 10, 11

Court Rule

U. S. Supreme Court Rule 19(1)(b) 4, 5

Treatise

1 Collier on Bankruptcy, 14th Ed., Section 2.04, fn. 1 11

1 Collier on Bankruptcy, 14th Ed., Section 2.61 12

Miscellaneous

Hearing Before a Subcommittee on the Judiciary, United States Senate (1935) 8, 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 21303 (9th Cir.)

MONTE VISTA LODGE,
Petitioner,

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Respondent respectfully submits this brief in support of its contention that there are no special and important reasons for review on writ of certiorari of the judgment of the United States Court of Appeals for the Ninth Circuit and the denial of rehearing by that court.

I. CITATION TO OPINION BELOW

The District Court did not publish an opinion. The opinion of the Court of Appeals for the Ninth Circuit is reported in: *Monte Vista Lodge v. The Guardian Life Insurance Company of America,* 384 F. 2d 126 (9th Cir. 1967).

II. QUESTION PRESENTED

The sole and narrow question presented, as framed by the United States Court of Appeals for the Ninth Circuit, is as follows:

> "The issue is whether or not the district court correctly concluded that pursuant to Chapter X, Section 263 of the Bankruptcy Act, it had no jurisdiction in a Chapter X proceeding to make an order that would affect or apply to Guardian Life under its deed of trust insured by the Federal Housing Authority under Section 231 of the National Housing Act." (384 F. 2d at 127-28.)

III. STATUTORY PROVISION INVOLVED

Section 263 (11 U.S.C. Sec. 663) provided as follows before its amendment in 1966:

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any corporation under a mortgage insured pursuant to the National Housing Act and acts amendatory thereof and supplementary thereto."

On November 3, 1966, an amendment was enacted to add the following sentence to the end of Section 263:

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any corporation under a mortgage insured pursuant to Title XI of The National Housing Act."

IV. STATEMENT OF THE CASE

Prior to May 1, 1963, petitioner and respondent entered into negotiations for a loan to be used by petitioner for construction and improvements to a project to house the elderly. (R. 77.) On May 1, 1963, respondent secured a commitment for loan insurance from the Federal Housing Administration (FHA) pursuant to Section 231 of the National Housing Act. (R. 77.) On July 1, 1963, petitioner executed a promissory note secured by a deed of trust, both in favor of respondent. (R. 78-79.) Thereafter, respondent made a series of advances of funds to petitioner; each advance was made pursuant to a certificate of mortgage insurance issued by the FHA insuring the proposed advance. (R. 80.) The first installment of principal was due and payable to respondent on December 1, 1964; this payment and payments subsequently due were never made by petitioner. (R. 80-81.) Respondent applied to the FHA for permission to expend funds pursuant to the above mentioned deed of trust in order to complete construction; after receiving assurance from the FHA that any funds so advanced were insured, respondent expended funds to complete the construction. (R. 81-82.) On February 3, 1966, respondent instituted an action to specifically

enforce provisions of the deed of trust. (R. 82.) Petitioner subsequently initiated a Chapter X proceeding. In its amended order of June 22, 1966, the District Court approved petitioner's Chapter X petition but modified its prior order of March 15, 1966, so as to exclude any portion thereof which purported to affect or to apply to respondent. The court expressly found that petitioner's Chapter X petition failed to disclose the fact that respondent was its major secured creditor and that Section 263 of the Bankruptcy Act applied to the trust deed executed in favor of respondent. (R. 77.) The court, however, stayed the effectiveness of the amended order, thereby enjoining respondent from foreclosing, until the issues raised by petitioner as to Section 263 were resolved on appeal. The petitioner appealed from the amended order of the District Court. However, the amended order was affirmed and a rehearing was denied by the United States Court of Appeals for the Ninth Circuit, the court in substance holding that Section 263 meant what it said.

V. ARGUMENT

A. NO "SPECIAL AND IMPORTANT REASONS" EXIST FOR GRANTING A REVIEW ON CERTIORARI.

In its over 30-year history, the meaning of Section 263 of the Bankruptcy Act has never been discussed in a reported opinion until the present case. Therefore, there is no conflict with the construction given the statute by the United States Court of Appeals for the Ninth Circuit. U.S. Supreme Court Rule 19(1)(b). Further, although the issue is important to the parties,

institutional lenders, and the FHA, it would by its very narrowness and infrequency of litigation not appear to be one that "should be settled" by the Supreme Court. U.S. Sup. Ct. Rule 19(1)(b). Finally, while respondent agrees with petitioner that the construction given Section 263 is probably of most importance to the FHA (Petition, p. 7.), the construction given the section by the District Court for the Southern District of California and the U.S. Court of Appeals for the Ninth Circuit is in accord with the construction given the section by the attorneys for the FHA. The following letter from the U.S. Department of Justice, acting on behalf of the FHA, was before the Ninth Circuit (in lieu of a brief) at the time it made its decision:

Mr. William B. Luck
Clerk, United States Court of Appeals
for the Ninth Circuit
San Francisco, California 94101

Re: *Monte Vista Lodge v. The Guardian Life Insurance Company of America (No. 21,303)*

Dear Mr. Luck:

The Federal Housing Administration has brought to our attention the pendency of the above-styled cause in your Court. One of the principal questions presented by the appeal is whether the district court correctly concluded that, in view of Section 263 of the Bankruptcy Act, 11 U.S.C. 663, the Appellant's Chapter X petition could have no effect upon its indebtedness to the Appellee for the reason that that indebtedness is secured by a mortgage and note insured by the Federal Housing Administration under Section

231 of the National Housing Act, as amended. The Federal Housing Administration has a substantial interest in the interpretation and application of Section 263 of the Bankruptcy Act in accordance with its plain terms and, accordingly, has asked us to make its views known to the Court.

While we have given consideration to the filing of an *amicus curiae* brief on behalf of the United States, as authorized by Paragraph 9(c) of Rule 18 of your Court, our examination of the briefs heretofore filed on behalf of the respective parties indicates that there is no necessity to burden the Court with an additional brief. The discussion contained at pages 10-19 of the brief for the Appellee Guardian Life Insurance Company of America adequately sets forth the position of the Federal Housing Administration respecting the meaning and effect of Section 263. We deem it sufficient to state that the Federal Housing Administration expressly endorses that discussion and strongly urges the affirmance of the order of the district court which is the subject of the appeal.

We are enclosing herewith sufficient copies of this letter for distribution to the judges who will be assigned to hear and decide the appeal. Additionally, copies of the letter have been air mailed on this date to counsel for the respective parties.

Yours very truly,

BAREFOOT SANDERS
Assistant Attorney General
Civil Division
By: /s/ MORTON HOLLANDER
Morton Hollander
Chief, Appellate Section

B. WHETHER ALTERNATIVE REMEDIES ARE OPEN TO PETITIONER WAS NOT BEFORE THE COURTS BELOW.

Petitioner has attempted to broaden the issue by its formulation of the questions presented (Petition, p. 3) and its suggestions that evidence be considered that was not properly before the courts below. (Petition, pp. 5, 8, 9 and 10.) The sole issue is limited to whether it was erroneously concluded that the District Court had no jurisdiction, due to Section 263, a provision of Chapter X of the Bankruptcy Act, in a Chapter X proceeding to make an order that would affect or apply to respondent under its FHA-insured trust deed. For this reason it is inappropriate to consider what remedies may be available to petitioner under other chapters of the Bankruptcy Act. (Petition, p. 8.)

C. SECTION 263 IS UNAMBIGUOUS.

A reading of this section shows that it is unambiguous. As stated by the Court of Appeals for the Ninth Circuit:

> "Section 263 is not ambiguous . . . and it is susceptible only to the meaning of its clear language. It states plainly that a creditor which has loaned funds to a debtor corporation and has received a mortgage evidencing such obligation insured under the provisions of the National Housing Act shall not be affected by any of the provisions of Chapter X of the Bankruptcy Act nor shall any of the provisions of Chapter X apply to such creditor."

It was therefore properly concluded that the District Court had no jurisdiction, due to the provisions of Section 263 of the Bankruptcy Act, to make an order in the Chapter X proceeding that affected or applied to respondent and that its first order of March 15, 1966, purported to affect or apply to respondent.

D. THE LEGISLATIVE HISTORY OF SECTION 263 COINCIDES WITH ITS PLAIN MEANING.

It is a fundamental rule of statutory construction that there is no need to investigate the legislative history of a statute where the statute is unambiguous on its face; however, an investigation of the legislative history underlying Section 263 reveals that the legislators meant what they said when they enacted this section.

Bankruptcy Act Section 77B(n) (the forerunner of Section 263) was amended in 1935 by the 74th Congress, First Session. The Senate subcommittee of the Committee on the Judiciary held a hearing on the amendment on June 18, 1935. (R. 61-w—61ee.) Mr. Abner Ferguson, the Assistant General Counsel of the FHA, testified before the subcommittee that the purpose of the amendment to Section 77B(n) was to take from within the operation and effect of the Bankruptcy Act the securities and holders thereof which were issued by so-called "low cost housing limited-dividend corporations." He stated that the effective operation of the plan set up by Section 207 of Title 2 of the National Housing Act dealing with low cost housing projects had been seriously retarded by the fact that they could be made subject to Section 77B. The reason was that the only outlets that were reasonably available for the financing of such projects were the large life insurance companies and the underwriting companies, and that these groups

had expressed a willingness to go into this sort of financing except for the existence of Section 77B which prevents foreclosures of their mortgages and the receipt of debentures representing the insurance. The following portions of Mr. Ferguson's statement are most enlightening in determining the construction to be given Section 263:

"The amendment is to section (n) of the act, and I can tell you just exactly what the change is that we wish made in it—

Senator VAN NUYS (interposing).

That subsection (n) now reads:

Nothing contained in this section shall be construed or be deemed to affect or apply to

****

And then you put in:

the creditors of any corporation under a mortgage insured pursuant to the National Housing Act and acts amendatory thereof and supplementary thereto * * *

That is new, I take it.

Mr. FERGUSON: That is right.

Senator VAN NUYS: I believe that is the only change.

Mr. FERGUSON: Yes, sir; except the words that we are putting in are

the creditors of any corporation under a mortgage insured pursuant to the National Housing Act and acts

amendatory thereof and supplementary thereto or the rights of such creditors or * * *

Senator VAN NUYS: A part of that is the old act.

Mr. FERGUSON: Yes; but these words are put in to make it read right. *The only change we are making in the Act is by way of adding language to the effect that this section 77B shall not apply to mortgages which are insured under the provisions of the National Housing Act.* (Emphasis added.)

Senator VAN NUYS: *You are just taking out of this act mortgages issued pursuant to the act so far as subdivision 77B is concerned?* (Emphasis added.)

Mr. FERGUSON: *That is all there is to it.* (Emphasis added.)

Senator VAN NUYS: Because they cannot sell securities in the face of Section 77B?

Mr. FERGUSON: Yes, sir."

The 1966 amendment to Section 263 is helpful in construing the meaning of the section in two ways. First, it reenacted the exact statutory language that previously existed without making any changes, thus tending to confirm the currency of the language. Second, it added a sentence to the end of the previous section for the purpose of bringing one more new and very narrow class of insured mortgage within the specific exclusion from Chapter X proceedings. The 1966 amendment was enacted as part of Public Law 89-754 which was entitled "Demonstration Cities and Metropolitan Development Act of 1966." Specifically, it was a portion

of Title V of that act, the primary subject of which was mortgage insurance for group practice facilities. The declaration of congressional purpose of that title was stated in Section 501 of Public Law 89-754, as follows:

> "It is the purpose of this title . . . to assure the availability of credit on reasonable terms to units or organizations engaged in the group practice of medicine, optometry, or dentistry, particularly those in smaller communities and those sponsored by co-operative or other nonprofit organizations, to assist in financing the construction and equipment of group practice facilities . . ."

It is clear that this declaration embodies the same congressional purpose that brought about the enactment of the original Section 263.

E. THE DISTRICT COURT'S INHERENT EQUITY POWERS DO NOT EXTEND ITS JURISDICTION TO AREAS EXPRESSLY PROSCRIBED BY THE BANKRUPTCY ACT.

Petitioner argues that restraint of respondent is authorized under the court's inherent equitable powers. (Petition, pp. 6 and 11.) A bankruptcy court's inherent power as a court of equity cannot extend to areas specifically proscribed by the Bankruptcy Act. The jurisdiction of the district courts sitting in bankruptcy is limited to matters conferred by statute or implied therefrom. 1 Collier on Bankruptcy, 14th Edition, Section 2.04, fn. 1. The court below had jurisdiction to determine its own jurisdiction to proceed; therefore, its express finding that respondent was within

the specific exclusion provided by Section 263 precluded further judicial restraint of respondent. There can be no "inherent" powers, equitable or otherwise, for a federal district court to act in an area expressly withdrawn from its jurisdiction by an act of Congress.

Petitioner also argues that Bankruptcy Act Section 2(a)(15) provides authority for temporary restraint of respondent. (Petition, pp. 6 and 11.) A reading of Section 2(a)(15) and reference to petitioner's citation to 1 Collier on Bankruptcy, 14th Edition, Section 2.61, discloses that the section merely embodies a legislative statement of the inherent equity power of a bankruptcy court to act to protect *property subject to its jurisdiction.* It follows that where a bankruptcy court lacks jurisdiction in a specific area, it cannot exercise a general statutory grant of power any more than it could exercise its inherent equity power.

Although petitioner purports only to seek "temporary" restraint of respondent (Petition, pp. 6, 10 and 11), respondent has in fact been restrained from completing its foreclosure sale since the filing of the original Chapter X petition on March 15, 1966.

Since petitioner has in fact thwarted respondent's attempts to foreclose its trust deed for nearly two years, hasn't petitioner in fact secured the "temporary" restraint it seeks, making its present arguments for further "temporary" restraint moot for all practical purposes?

VI. CONCLUSION

The language of Section 263 which petitioner seeks to have interpreted out of existence was adopted more than thirty years

ago. The dearth of litigation with respect thereto indicates that the language is in fact free from ambiguity, and that it has worked well to achieve the policy objective which it embodies, which is, obviously, to promote and encourage lenders to advance funds for the construction of housing under the FHA program by assuring them that, in the event of a default in the payment of such a loan, the lender would be able to realize on its FHA insurance without being subjected to years of delay before the Bankruptcy courts, which delay would largely nullify the benefits of such insurance.

The District Court and the Court of Appeals for the Ninth Circuit correctly decided the within matter by recognizing that Section 263 means what it says.

It is therefore respectfully submitted that petitioner's Petition For Writ of Certiorari should be denied.

Respectfully submitted,

STERLING HUTCHESON
14th Floor, Bank of America Building
San Diego, California 92101
Attorney for Respondent.

GRAY, CARY, AMES & FRYE
ROBERT AMES
DAVID E. MONAHAN
14th Floor, Bank of America Building
San Diego, California 92101

ADAMS, DUQUE & HAZELTINE
BRUCE A. BECKMAN
523 West Sixth Street
Los Angeles, California 90014
of Counsel